In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 765

RUSSEL MILTON WILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial, petitioner was convicted in the United States District Court for the Western District of Washington, for refusal to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462 and 32 C.F.R. 1632.14. He was sentenced to five years' imprisonment, to be eligible for parole only after he had served two years of the sentence. The court of appeals affirmed (Pet. App. 2–8).

1. The pertinent facts are not in dispute.[1] On Octo-

[1] Petitioner's Selective Service file (Gov't Exh. 1), which contains a full record of the administrative proceedings and was part of the record before the court of appeals, is being lodged with the Clerk of this Court.

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ber 15, 1965, petitioner, who was then classified 2–S, sent a letter to his local board in Berkeley, California, advising that he had "intentionally destroyed" his draft card, that he would "henceforth refuse to carry another" or cooperate with the local board "in any manner whatsoever," and that he was taking these actions for "purely patriotic" reasons (Pet. App. 3). On October 21, 1965, petitioner was declared a delinquent, pursuant to 32 C.F.R. 1642.4,[2] and reclassified 1–A under 32 C.F.R. 1642.12 (Pet. App. 11–12). An entry was made on his Selective Service cover sheet that he had "Destroyed reg. card" (Pet. App. 7). On October 23, he was notified of such reclassification, with no reason being assigned therefor (Pet. App. 12).[3] This notice advised him of his right to a personal appearance before the local board, his right to seek information and advice from any local board, and his right to appeal his 1–A classification. After some postponements, petitioner was notified to report for induction on February 24, 1966. He appeared at the induction center as ordered but refused to submit to induction (Pet. App. 12).

2. Petitioner argues that the notation by the local board when it declared him a delinquent—"[d]estroyed his registration certificate"—indicates that he

[2] This regulation provides in pertinent part: "Whenever a registrant has failed to perform any duty * * * required of him under the selective service law * * * the local board may declare him to be a delinquent."

[3] The notice of delinquency (dated October 21, 1965) was not mailed to petitioner until January 3, 1966 (Pet. App. 4). It stated that the basis of the board's order was that he had "[d]estroyed his registration certificate" (Pet. App. 7).

was declared delinquent for destroying his draft card in violation of the 1965 amendment to Section 12(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3), 79 Stat. 586), which punishes the knowing destruction or mutilation of Selective Service certificates. He thus argues that his case will be governed by the ruling in *United States* v. *O'Brien*, No. 232, this Term, in which the issue is the constitutionality of that statute.[4]

The draft-card burning statute is not, however, involved here. The Selective Service regulations define a delinquent as "a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law" (32 C.F.R. 1602.4; see also 32 C.F.R. 1642.4(a)). The regulations further provide that registrants found to be delinquent may be reclassified 1–A (32 C.F.R. 1642.12, 1642.13). The authority to declare petitioner a delinquent therefore could properly rest on petitioner's violation of the regulation requiring that he retain his registration certificate "in his personal possession at all times" (32 C.F.R. 1617.1).[5] Here the draft board did not indicate that it was proceeding under the statute either in the

[4] Certiorari was granted in No. 232 on October 9, 1967; O'Brien's cross-petition (No. 233, this Term), raising a related question which the Court need reach only if the 1965 amendment is held unconstitutional, was likewise granted.

[5] It has been held that a local board has authority to reclassify a registrant as delinquent only where the registrant failed to comply with an affirmative duty created by a specific administrative regulation. See *Wolff* v. *Selective Service Local Board No. 16*, 372 F. 2d 817, 821–822 (C.A. 2).

delinquency notice that it sent to petitioner, or in the entry as to delinquency that it made in petitioner's Selective Service file; it simply noted that his classification was being changed because he had destroyed his draft card. In the same letter in which petitioner notified his local board that he had destroyed his certificate, he stated that he would "henceforth refuse to carry another." His violation of the affirmative duty under the regulations to keep the card in his personal possession was thus clear. However his conceded non-possession came about, that situation justified his being declared a delinquent; his delinquency, in turn, authorized his reclassification.

This interpretation of the administrative action does not inject into the case an issue comparable to the one raised by the First Circuit's ruling in *O'Brien* which is challenged in No. 233, this Term. There, even though the court of appeals held the statutory provision relating to destruction unconstitutional, it affirmed O'Brien's conviction on the theory that the evidence necessarily established a violation of the "possession" regulation. The question raised is whether, on that basis, the defendant was sufficiently informed of the criminal charges against him. In this case, however, petitioner was never charged with the criminal offense either of draft-card burning or of non-possession. The only criminal charge against him was the failure to report for induction after being ordered to do so; that was the crime of which he was convicted, and he is necessarily limited here to seeking review of the Ninth Circuit's affirmance of that conviction.

Hence, the imprecise wording by the draft board of the reason for petitioner's treatment as a delinquent

did not result in any uncertainty in the indictment. Petitioner had made clear that he had not only destroyed his card but would not carry another. The fact that the draft board made a notation that he destroyed his card rather than that he refused to carry it in no way affected his conduct before or after indictment.[6] He was at all times aware of the charges against him and was in no way prejudiced in framing his defense.[7] As the court of appeals pointed out, at least as to the validity of petitioner's reclassification, "Destruction is, in fact, no more than a willful and defiant refusal to possess" (Pet. App. 8).

Petitioner's reference (Pet. 10) to *Wolff* v. *United States*, 372 F. 2d 817 (C.A. 2), deserves mention. There, the Second Circuit concluded that "it is not the function of local boards in the Selective Service System to punish these registrants by reclassifying them I–A because they protested * * * the Government's involvement in Vietnam" (*id.* at 822). In the instant case, however, petitioner was reclassified because of his failure to comply with pertinent Selective Service

[6] Nor was the tardy sending of a notice of petitioner's being declared a delinquent in any way prejudicial to petitioner, except perhaps as to whether he had properly exhausted his administrative remedies in challenging the propriety of his reclassification, and on that point the court of appeals ruled in petitioner's favor (see Pet. App. 3–6).

[7] While petitioner poses, as a question presented, the validity under the First Amendment of the possession regulation (Pet. 3), he does not seriously argue the issue. The regulation was adopted long before the protest activity in which petitioner engaged. We know of no court which has found the regulation to be invalid. See, *e.g. United States* v. *Kime*, 188 F. 2d 677 (C.A. 7), certiorari denied 342 U.S. 823; *O'Brien* v. *United States*, 376 F. 2d 538, 540–541 (C.A. 1).

regulations, which required him to carry his draft card, and not because of any protest activity as such. Thus, the situation here differs significantly from that involved in *Wolff*. We recognize that whether an administrative reclassification amounts to a penalty might in some circumstances present a substantial question. But petitioner has made no such contention, either in this Court or in the courts below. And since that question has neither been raised nor developed on the record, this would appear an inappropriate case in which to consider it.

It is therefore respectfully submitted that there is no need to defer action on this petition pending a ruling in *O'Brien* and that the petition for a writ of certiorari should be denied.

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